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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1949

No. ~~[illegible]~~ 40

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

CAPITAL TRANSIT COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STATEMENT OF CAPITAL TRANSIT COMPANY OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EDMUND L. JONES,
F. G. AWALT,
SAMUEL O. CLARK, JR.,
DARYAL A. MYSE,
Counsel for Appellee,
Capital Transit Company.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 629

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

CAPITAL TRANSIT COMPANY,

Appellee

STATEMENT IN SUPPORT OF MOTION TO DISMISS OR AFFIRM AND REPLY TO APPELLANTS' STATEMENT AS TO JURISDICTION

I

Introductory Statement

The appellants, United States of America and Interstate Commerce Commission, seek to raise a number of questions by their assignment of 11 alleged errors of the Court below, and thereby seek to complicate a simple issue of jurisdictional conflict between two regulatory agencies, both of which were created by Congress. However, appellants' Statement as to Jurisdiction does not include, in the statement of the purported grounds upon which it is contended that the questions involved are substantial, any grounds

related to most of the assignments of error. Indeed, cert
of the assigned errors, such as numbers 4 and 5, appear
their face to be frivolous.

Other assignments of error, such as numbers 3 and 6, s
to raise questions as to the findings of the Court below,
all of such findings were based upon uncontradicted
undisputed evidence either before the Commission or bef
the Court. The extreme to which the appellants have g
in attacking the Court's findings is illustrated by assi
ment of error number 6 which, among other things, atta
the Court's finding number 1. This finding is based u
paragraph II of the Complaints in Civil Action Nos. 249
and 3052-48. The substance of the allegations therein
admitted by the answers of the appellants in Civil Act
No. 2496-47 and not denied in Civil Action No. 3052-48.

Appellants, by their pleadings or otherwise, have ne
disputed up to this point the accuracy of the facts sta
in the District Court's findings numbered 4, 9, 10, 11, 12,
16, 17, and 18, assigned as error in Assignments of er
numbered 3, 6, 7, and 11.[1] Although appellants had

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[1] Appellants' assignment of error number 3 attacks the lower co
findings numbered 9, 10, 11, 12, 15 and 16. Many of such findings
based upon documents attached to the complaints and made a part of
record by the Court (see p. 100, transcript of Court hearing, Nov
1948).

Finding number 9 is supported by the allegations of paragraph
of the Complaint in No. 2496-47 with respect to the petition to the
and the admission thereof by the answers of appellants. The facts
respect to the petition to the District Commission are shown by Exh
M and N of the Complaint in No. 2496-47, not denied by appellants,
by Exhibit 137 in ICC Docket No. 28991.

Finding number 10 is supported by the terms of the Report and O
of the Commission in its Docket No. MC-C-891, dated May 9, 1947
sheet 6).

Finding number 11 is supported by Exhibit 137 in ICC Docket
28991.

Finding number 12 is supported by Exhibits 132, 141 in ICC D
No. 28991, the admissions in the answers of appellants to paragraph

ple opportunity to object to the specific findings suggested by Capital Transit Company and submit their own, they did not do so. Certain of the defendants below who did submit such findings did not in any substantial manner dispute the findings of the Court now assigned as error; but on the contrary, confirmed such findings. (See findings submitted by Virginia companies; number 8, last three sentences; number 13, first sentence and last two sentences.) Nor do the appellant Virginia companies in their assignments of error on appeal raise any questions as to the accuracy of any of the Court's findings, except as to one minor sentence.

The Appellants here assign as error number 1 an assertion that the Court below undertook "to substitute its judgment for that of the Interstate Commerce Commission with respect to transportation questions confided by law to the Interstate Commerce Commission, in failing to accept

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of the Complaint in No. 3052-48, and the statements of the ICC in its Report and Order in Docket No. 28991, dated July 7, 1948 (Sheet 3).

Finding number 15 is supported by Exhibit N of the Complaint in No. 3052-48.

Finding number 16 is supported by the certified copy of the District Commission's Opinion and Order No. 3422 received in evidence by the Court (see p. 99, transcript of court hearing, Nov. 16, 1948).

Appellants' assignment of errors number 6 and 11 attack the lower court's findings numbered 1, 17, and 18.

Finding number 1 is supported by the admission in the answers of appellants to paragraph II of the complaint in No. 2496-47.

Findings number 17 and 18 are supported by Exhibit 137 in ICC Docket No. 28991; the uncontradicted testimony on pages 1474-1476, 1516, 1605, 1746, 1890-1891, 1897 and 1902 of the transcript of hearings before the ICC in Docket No. 28991, Nov. 19, 1947, Nov. 20, 1947, and Nov. 21, 1947; and the uncontradicted testimony on pages 32-38 of the transcript of hearings before the ICC in Docket No. MC-C-891, April 25, 1947.

Appellants assignment of error number 7 attacks the last sentence of the lower court's finding number 4. This finding is supported by Exhibits B, C, and D of the Complaint in No. 2496-47, by Exhibits B and C of the Complaint in No. 3052-48, and by the admissions in the answers of appellants with respect thereto.

findings of the Interstate Commerce Commission which we amply supported by the evidence, * * *." Appellan do not elaborate this assignment of error; and a mere rea ing of the July 7, 1948 Report and Order of the Commissi will show that the Commission made no findings of fa which are in conflict with those of the Court below. Inde the Commission ignored and made no findings with respe to such facts found by the Court. Its Report consists of series of erroneous conclusions of law on a part only of t jurisdictional questions involved, based upon its erroneo application of the doctrine of *res judicata*.

Appellants' assignments of errors ignore the basis f the decision of the Court below. Their conception of t issues and statutes involved include issues and questions statutory construction which were not necessary to t decision below. That decision simply held that the Inte state Commerce Commission was without jurisdiction a that the Public Utilities Commission of the District of C lumbia had regulatory power over the subject matter of t controversy. The only statutory provision of Part II of t Interstate Commerce Act relied upon by the Court is t proviso to Section 216(e) (49 U. S. C. 1946 Ed. § 316(e which prohibits the exercise of rate regulatory jurisdicti by the Interstate Commerce Commission over transport tion from one point to another within the District of Colu bia. The District Court's conclusions of law show that also relied upon certain provisions of the District Pub Utility Law.

There was and is no controversy over jurisdiction of t Interstate Commerce Commission to regulate the admitted interstate services, and the rates and charges therefor, the defendant Virginia Companies, between their downto District of Columbia terminal points and points on the respective lines in Virginia. The controversy decided the Court below related solely to the conflict between t

jurisdiction and requirements of the two Congressionally created regulatory agencies as they related to the present service of Capital Transit Company conducted wholly from one point to another within the District as an indistinguishable part of its local transportation services to all persons within the District. Accordingly, the judgment of the Court below set aside and enjoined the orders of the Interstate Commerce Commission only "insofar as they relate to transportation by Capital Transit Company and the rates, fares, charges, or compensation therefor."

Appellants assert that the "district Court's judgment would be productive of consequences highly detrimental to important public interests relating to national defense." The basis for this statement appears to be the further assertions that "the passengers affected by the rates which the Commission fixed at a reasonable level * * * are employees of the Government who live in the District of Columbia and work in the Pentagon Building, the Navy's Arlington Annex, and other national defense installations in nearby Virginia"; that "the Interstate Commerce Commission is the only tribunal with authority to pass upon the reasonableness of the fares now exacted from these passengers;" and that "there was testimony of record that because of the high fares exacted * * * it was difficult to recruit employees in services so vital to the national defense." But there is no substantial evidence of record to support any of such statements. The uncontradicted evidence of record shows that fares were not a major factor in the recruitment of Pentagon employees (pp. 1860-1861, transcript of hearing, ICC Docket No. 28991, Nov. 21, 1947); that the fares in question were applicable to certain persons in private residence in Virginia working in the District in discrimination against other persons receiving comparable service (pp. 1506-1509, 1512, transcript of hearing, ICC Docket No. 28991, Nov. 19, 1947); and that the compensa-

tion prescribed by the Commission for the service of Capital Transit was confiscatory in that the costs of such service far exceed the compensation so prescribed (Exhibits 135, 136, 163; pp. 1885-1894, transcript of hearing, ICC Docket No. 28991, Nov. 21, 1947; affidavit of J. E. Heberle, dated July 28, 1948; pp. 40-41, transcript of hearing, ICC Docket No. MC-C-891, April 25, 1947). Neither the Navy Department, the National Military Establishment, nor the Secretary of Defense, took enough interest in the proceedings to be represented at the hearings before the Commission. We believe that the local application of any authority of the Interstate Commerce Commission to transportation wholly within the District of Columbia is far removed from the broad national purposes of the Interstate Commerce Act. We submit that there could be no questions presented in this case which would have any bearing upon transportation regulation beyond the local regulatory problems which are completely subject to the regulatory power of the District Commission.

We know of nothing in the Constitution of the United States or the Interstate Commerce Act which empowers the Interstate Commerce Commission to prescribe confiscatory and discriminatory compensation for local transportation service, artificially and involuntarily made a part of an independent interstate service, for asserted national defense purposes.[2]

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[2] The Court below in its order granting an interlocutory injunction dated August 4, 1948, found that "uncontradicted evidence in the record shows that the average cost to plaintiff [Capital Transit] justly apportionable to transporting from one point to another within the District of Columbia, persons who travel to or from said Virginia points, using the facilites of said Capital Transit Company, is not less than 9.721 cents per passenger, without inclusion of any sum as compensation for the use of plaintiff's property in such service; and that if the allocation to the plaintiff of the sum of seven cents (7¢) from the joint fare prescribed in said order of July 7, 1948 were continued, the plaintiff would suffer therefrom a loss of not less than $4,635 per month."

Moreover, any argument of appellants that the jurisdiction of the Commission is based upon national defense needs relates to questions under Section 203(b)(7a) and (8) of the Interstate Commerce Act (49 U. S. C. 1946 Ed. § 303(b)(7a) and (8)). The Court below properly refrained from reaching a decision under such Section 203(b)(7a) and (8), because of its conclusions based upon the proviso to Section 216(e) of the Act and *United States v. Yellow Cab Co.*, 332 U. S. 218. The provisions of Section 203(b)(7a) and (8) become important only if it is assumed that the Capital Transit Company's local transportation service within the District is in interstate commerce and, if so, it in addition, does not fall within the broad geographical meaning of "intrastate transportation" as contained in the proviso to Section 216(e). But irrespective of whether Section 203(b)(7a) and (8) is involved in this case, there is no substantial evidence of record which would support the necessary finding by the Commission, under that Section, that application of the provisions of the Interstate Commerce Act are presently necessary to carry out the National Transportation Policy declared in the Act.

Appellees raised numerous other independent and substantial questions in the Court below which were neither heard, argued, nor decided by that Court. Included were important questions as to the jurisdiction or statutory authority of the Commission to act in the manner it did, assuming *arguendo* that the Interstate Commerce Act applies to the services and compensation of Capital Transit Company involved. It is clear, however, that on the basis of the lower Court's conclusions there was and is no necessity to decide any of the other questions raised. This Court should not undertake to determine questions on which neither argument nor full hearing was permitted below and which were not decided by the Court below.

II

Statutory Basis of the Lower Court's Decision on the U contradicted and Undisputed Evidence Is Not Reasonab Open to Argument

All of the orders of the Interstate Commerce Commissio involved constitute an exercise of regulatory jurisdiction b that Commission over the rates, fares, charges, or compe sation of Capital Transit Company for local passeng streetcar and bus transportation service conducted whol from one point to another within the District of Columbia Such orders are in direct conflict with orders of the Publ Utilities Commission of the District of Columbia regulati the compensation of Capital Transit Company for the san service.

The Court below heard argument on only one point co cerning the Commission's jurisdiction or statutory power regulate such compensation for such service. It found it u necessary to hear further argument on numerous other su stantial, alternative, and independent questions as to t lack of jurisdiction and as to the unlawfulness or co fiscatory nature of the Commission's Orders.

The Decision of the Court Below

The opinion of the Court below on the sole point argu was as follows:

> "The Court is of the opinion that the Interstate Co merce Commission is without jurisdiction to make t orders here in question, and that the regulatory pow with respect to the matter in controversy lies with t Public Utilities Commission for the District of Colu

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[8] Appellants imply that interstate service to and from points in Ma land is involved but it is clear that the Commission's orders apply only transportation to and from points within the District of Columbia.

bia, *United States* v. *Yellow Cab Co.*, 332 U. S. 218; United States Code, Title 49, Section 316(e) (proviso)."

The Court's Conclusions of Law were based upon Findings of Fact which are in turn based upon uncontradicted and undisputed evidence.[4] Such Findings of Fact included, among others, the following:

"17. On April 1, 1947, Capital Transit Company discontinued all of its motor bus operations across the State line between points in the District of Columbia and points in Arlington County, Virginia; and since that date all transportation by Capital Transit Company, of persons travelling between points in the District of Columbia and points in Arlington County, Virginia, has been conducted wholly from one point to another within the District; and the Company no longer renders service across the Virginia State line to such persons. Such transportation service by Capital Transit Company to such persons to and from the downtown terminal points of the Company's bus and streetcar lines within the District is no different from and is indistinguishable from and intermingled with the other local transportation services furnished by the Company to all other persons within the District. Capital Transit Company is engaged in the intrastate transportation or intra-District transportation of passengers over the entire length of all of its routes within the District used by persons travelling to or from Virginia points via the lines of the Virginia Companies, under rules and regulations and at rates prescribed by the District Commission; such Capital Transit Company lines are not limited to such persons travelling to and from Virginia points; and the transportation service rendered to such persons by Capital Transit Company is casual and incidental to its other local operations within the District."

"18. Capital Transit Company has no physical connections, coordination, arrangements for through trans-

[4] See footnote 1 above.

portation service or interchange of passengers, or com
mon terminal points with either of the Virginia Com
panies. At no time has it voluntarily engaged in th
joint transportation of passengers with either of th
Virginia Companies. The passengers on the Virgini
lines are free to come and go from the terminals of such
lines within the District of Columbia by means othe
than the transportation service of Capital Transit Com
pany which may be rendered in the vicinity of such ter
minals. There is no relation in time or continuity be
tween the transportation service on the lines of Capita
Transit Company within the District and the transpor
tation service on the lines of the Virginia Companie
terminating in the District."

On the basis of its findings the sole question the Court found it necessary to decide concerned the conflicting Federal regulatory jurisdiction or statutory power between the Interstate Commerce Commission and the Public Utilities Commission of the District of Columbia. The conflict of regulatory jurisdiction related to the compensation of Capital Transit Company for its transportation service wholly within the District. The decision of the lower Court in favor of jurisdiction in the District Commission was based upon the proviso to Section 216(e) of the Interstate Commerce Act (49 U.S.C. 1946 Ed. § 316(e)) in its relation to the provisions of the Public Utility Law of the District (43 D.C. Code, 1940, § 101-1007) and the Merger Act of January 14, 1933 (Pub. Res. No. 47, 72nd Congr.; 47 Stat. 752, ch. 10).

The Jurisdictional Limitation of the Proviso to Section 216(e)

Section 216 of the Interstate Commerce Act (49 U.S.C. 1946 Ed. § 316) contains the only statutory provisions giving the Interstate Commerce Commission authority to fix rates or compensation for transportation service of motor

carriers under its jurisdiction. Section 216(e), however, contains a proviso restricting the Commission's regulatory jurisdiction in this respect as follows:

> ": *Provided, however,* That nothing in this part [Part II of the Act] shall empower the Commission to prescribe, or in any matter regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any purpose whatever."

The foregoing proviso is a clear and unambiguous prohibition against exercise of the rate regulatory power of the Commission over "intrastate transportation", *i.e.*, transportation from one point to another within a State. Since by definition in Section 203(a)(8) of the Act (49 U.S.C. 1946 Ed. § 303 (a)(8)) the term "State" includes the District of Columbia, the statutory restriction on the Commission's jurisdiction to regulate rates or charges for transportation wholly within a State is also applicable as a restriction against rate regulation and transportation wholly within the District, *i.e.*, intra-District transportation. "Intrastate transportation" is a geographical concept which is different and broader in scope than the legal concept of transportation in "intrastate commerce". It includes all transportation between points entirely within State boundaries without distinction between the niceties of what parts of the transportation may or may not be held to be in interstate commerce or in intrastate commerce under varying circumstances.

The statutory restriction imposed on the Commission's rate regulatory power by the proviso to Section 216(e) represents the adoption of a widely different policy by Congress from that adopted in enacting legislation governing railroad rate regulation by the Commission. That policy

against Federal rate regulation of intrastate transportation by motor carriers is a determination by Congress that such regulation is unnecessary for effective rate regulation of motor carrier transportation in interstate commerce across State lines. Such regulation is flatly prohibited for any purpose whatever, even though both kinds of transportation may be blended and intermingled in actual operation. This statutory prohibition shows that Congress clearly intended to leave rate regulation of intrastate transportation to traditional State control. That policy was adopted in deference to widespread protests by the States against application of Federal rate regulatory power over motor carrier transportation service between points within a State which would interfere with the long exercised rate regulatory jurisdiction of the States over such transportation service.[8]

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[8] Although the clear and unambiguous terms of the proviso to Section 216 (e) of the Act make reference to its legislative history superfluous, it is significant to note that that history shows that Congress acted upon the protests of the States in part by insertion of this proviso and in part by a refusal to amend the additional restriction against regulation of intrastate commerce by motor carriers contained in Section 202(b) of the Act (49 U.S.C. 1946 Ed. § 302(b)). The proviso to Section 216(e) was inserted by the House Committee with the explanation that it was intended as a prohibition of "the extension of Federal regulation in intrastate transportation" as exercised by the Commission under the railroad regulatory provisions of the Act. (H. Rept. No. 1645, 74th Congr., 1st Sess., p. 4).

The Senate Committee, on recommendation of Commissioner Eastman of the Interstate Commerce Commission, had proposed an amendment to the provisions of Section 202(b) as they now exist which would have permitted regulation by the Commission of transportation wholly within a State where it affected interstate commerce. Upon objections by the National Association of Railroad and Utilities Commissioners, representing the States, the Senate adopted Senator Gore's motion to eliminate all of the objectionable amendment. (79 Congr. Rec. 5735-5737). Senator Gore's statement in support of his motion is illuminating in view of the Commission's present contentions. He said:

> "I think the clause ought to be striken out. I do not believe we ought to bring truck and bus transportation which is entirely within a State, under the jurisdiction of the Interstate Commerce Commis-

The Motor Carrier Act (Part II of the Interstate Commerce Act) was intended as an aid to the States in their regulation of intrastate transportation with the least conflict possible between State and Federal regulation of motor carriers. (S. Rept. No. 482, 74th Congr., 1st Sess., p. 3; H. Rept. No. 1645, 74th Congr., 1st Sess., pp. 3, 4). The existence of authority of the Commission to act under circumstances resulting in such a conflict cannot rest on inference. *Cf. Connecticut L. & P. Co.* v. *Federal Power Comm.*, 324 U. S. 515, 532; *City of Yonkers* v. *United States*, 320 U. S. 685, 692; *Federal Trade Comm.* v. *Bunte Bros.*, 312 U. S. 349, 351-353.

The orders of the Interstate Commerce Commission involved in this case represent a flagrant disregard of the Congressional policy of prohibition as contained in the proviso to Section 216(e) of the Act. They also conflict with the clear statutory jurisdiction of the Public Utilities Commission of the District of Columbia as granted to it by Congress. Under their assignment of errors appellants would have the Courts ignore the applicable statutes of Congress granting jurisdiction to the District Commission in the same manner as the Commission has ignored them.

The Statutory Authority of the District Commission

Congress, by Act of March 4, 1913 (37 Stat. 974; Title 43, D.C. Code, 1940 §§ 101-1007), created the District Commission and gave it broad regulatory powers over common carriers operating within the District of Columbia. The jurisdiction of the District Commission under that Act was made to depend solely on the fact of transportation opera-

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sion on some sort of remote theory that it might directly or indirectly affect interstate commerce."

The Commission is now contending for a construction of the Act which would give it jurisdiction over the very kind of transportation service which Congress expressly refused to give it.

tions within the geographical limits of the District, without regard to whether such transportation was a part of a stream of interstate commerce, or part of an interstate journey, or not. The grant of jurisdiction on such a geographical basis to the District Commission was necessary in order that it might be clothed with ample authority for effective regulation. The geographical area and physical characteristics of the District are such that any jurisdictional grant limited by the constitutional concept of interstate commerce would have been without practical significance and in effect a nullity.

Section 43-111, D. C. Code, 1940 (37 Stat. 975, ch. 150 § 8, par. 1; 39 Stat. 13, ch. 34; 39 Stat. 521, ch. 367; 39 Stat. 536, ch. 412) defines the common carriers subject to the District Commission's jurisdiction, in relation to jurisdiction of the Interstate Commerce Commission, by careful inclusion and exclusion. The inclusory part of the definition is broad and shows clearly that Congress was basing the District Commission's jurisdiction on "the conveyance of persons or property within the District." The exclusory part of the definition excludes the District Commission's jurisdiction only over steam railroads and express companies subject to the jurisdiction of the Interstate Commerce Commission, and certain other specified transportation companies engaged in interstate commerce. But here again the District Commission was given jurisdiction over the operations of certain of such companies "inside the District."

Section 43-122, D. C. Code, 1940 (37 Stat. 977, ch. 150 § 8, par. 1) makes the provisions of the District Public Utility Law and the jurisdiction of the District Commission thereunder, applicable to the "transportation of passengers • • • from one point to another within the District of Columbia, and any common carrier performing such

service; * * *" This statute describes exactly the transportation service now rendered by Capital Transit Company involved in the orders of the Interstate Commerce Commission in this case.

Section 43-207, D. C. Code, 1940 (37 Stat. 995, ch. 150 § 8, par. 96) specifically transferred to the District Commission and specifically enjoined the Interstate Commerce Commission from exercising jurisdiction over transfer arrangements between streetcar and bus lines and over streetcar service within the District, formerly exercised by the Interstate Commerce Commission under an Act of Congress of May 23, 1908 (35 Stat. 250, ch. 190, §§ 12, 16; Public Law 134, 60th Congr., 1st Sess.).

By the Merger Act of January 14, 1933, (47 Stat. 752, ch. 10; Public Res. No. 47, 72nd Congr.) Congress confirmed the broad regulatory powers of the District Commission over the operations and corporate affairs of Capital Transit Company. By Section 13 of the Merger Agreement, approved in the Merger Act, the District Commission's authority over transfer arrangements on Capital Transit lines within the District was broadened. The Interstate Commerce Commission orders involved in this case attempt to regulate by prescribing transfers on the streetcar and bus lines of Capital Transit within the District in direct conflict with the District Commission's statutory authority in this respect.

The broad scope of the District Commission's regulatory power over the operations of Capital Transit Company includes authority to fix rates, charges, joint rates, regulations and practices. (Sections 43-411, 43-911, D. C. Code, 1940; 37 Stat. 983, 992, ch. 150, § 8, pars. 41, 88). Under Sections 43-329 and 43-902, D. C. Code, 1940 (37 Stat. 981, 991, ch. 150, § 8, pars. 30, 81) it is unlawful for Capital Transit to receive from any person, firm, or corporation compensation for its service performed within the District

which is less than the compensation prescribed in the tariffs lawfully in force within the District under orders of the District Commission, or less than the compensation the Company receives from any other person for a like and contemporaneous service.

The District Commission's Orders.

Acting under its statutory authority the District Commission has from time to time fixed the fares, charges, and compensation of Capital Transit Company for its transportation service from one point to another within the District. On June 11, 1947, by its Order No. 3209, the District Commission expressly construed its rate fixing orders to be applicable to the transportation service of Capital Transit involved in the orders of the Interstate Commerce Commission in this case. (Exhibit 137, I.C.C. Docket No. 28991). Order No. 3209 ordered and determined as follows:

> "Section 1. That the transportation of passengers by Capital Transit Company from one point to another within the District of Columbia is subject to the jurisdiction of this Commission, irrespective of whether or not such passengers may have origins or destinations from or to points without the District of Columbia via the lines of other common carriers of passengers.
>
> "Section 2. That the fares or compensation to be charged, demanded, collected, or received by Capital Transit Company for service rendered or to be rendered by it from one point to another within the District of Columbia to passengers travelling between points in the District of Columbia and points in Arlington County, Virginia, shall be no greater nor less than 10 cents cash or a weekly pass to be sold at $1.50, as authorized by this Commission.
>
> "Section 3. That this order shall take effect on and after 12:01 a.m., June 22, 1947."

In its latest rate fixing Opinion and Order No. 3422, dated October 1, 1948, the District Commission authorized an increase in the cash fare of Capital Transit to 13 cents per ride and in the weekly pass fare to $1.75 for transportation service within the District. The District Commission also found that the Interstate Commerce Commission's Order of July 7, 1948, fixing a maximum of 7 cents per ride as the compensation of Capital Transit for its service wholly within the District, would result in unlawful discrimination in favor of and preference to those passengers using the facilities of Capital Transit within the District in travelling to and from the designated points in Arlington County, Virginia. (See page 15(a)). On July 20, 1948, Capital Transit was notified by the District Commission that because of the Interstate Commerce Commission's Order of July 7, 1948, the company must cease and desist honoring any joint fare tickets applicable to the lines of the company under such order to comply with the District Commission's Order No. 3209. (Exhibit N to Complaint in No. 3052-48).

The Court below correctly resolved this direct conflict between the orders of the Interstate Commerce Commission involved herein and the outstanding orders of the District Commission in favor of the District Commission in accordance with the clear effect of the statutes of Congress involved.

The Decisions of this Court.

In addition to the foregoing statutes, two decisions of this Court foreclose further argument in support of the Government's contentions that the Interstate Commerce Commission has jurisdiction to regulate the rates or compensation of Capital Transit Company for transportation service wholly within the District of Columbia.

United States v. *Yellow Cab Co.*, 332 U. S. 218, was cited

in the Opinion of the Court below. In that case this Court was called upon to determine whether either of two distinct kinds of taxicab service in the City of Chicago constituted transportation in interstate commerce. With respect to taxicab service under contract as a regular course of business between railroad stations in Chicago this Court held that such transportation was a part of the stream of interstate commerce. With respect to the familiar kind of taxicab service in every city in the land, including service to and from the same railroad stations, this Court held that such transportation was too unrelated to interstate commerce to constitute a part thereof. On this point the Court said (332 U. S. at pp. 230-231):

> "Many persons are said to embark upon interstate journeys from their homes, offices and hotels in Chicago by using taxicabs to transport themselves and their luggage to railroad stations in Chicago. Conversely, in making journeys from other states to homes, offices and hotels in Chicago, many persons are said to complete such trips by using taxicabs to transport themselves and their luggage from railroad stations in Chicago to said homes, offices and hotels. Such transportation of persons and their luggage is intermingled with the admittedly local operations of the Chicago taxicabs. But it is that allegedly interstate part of the business upon which rests the validity of the complaint in this particular.
>
> We hold, however, that such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act."

In discussing the considerations which led it to rule that the usual kind of taxicab service was not a part of interstate commerce, the Court stated that (332 U. S. at pp. 231-232):

> "These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations,

admittedly cross no state lines; by ordinance, their service is confined to transportation 'between any two points within the corporate limits of the City.' None of them serves only railroad passengers, all of them being required to serve 'every person' within the limits of Chicago. They have no contractual or other arrangement with the interstate railroads. Nor are their fares paid or collected as part of the railroad fares. In short, their relationship to interstate transit is only casual and incidental.

In a sense, of course, a traveler starts an interstate journey when he boards a conveyance near his home, office or hotel to travel to the railroad station, from which the journey is continued by train; and such a journey ends when he alights from a conveyance near the home, office or hotel which constitutes his ultimate destination. Indeed, the terminal points of an interstate journey may be traced even further to the moment when the traveler leaves or enters his room or office and descends or ascends the building by elevator.

But interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. Swift & Co. *v.* United States, 196 U. S. 375, 398, 25 S. Ct. 276, 280, 49 L. Ed. 518; North American Co. *v.* Securities & Exchange Comm., 327 U. S. 686, 705, 66 S. Ct. 785, 796, 90 L. Ed. 945. And interstate journeys are to be measured by 'the commonly accepted sense of the transportation concept.' United States *v.* Capital Transit Co., 325 U. S. 357, 363, 65 S. Ct. 1176, 1179, 89 L. Ed. 1663. Moreover, what may fairly be said to be the limits of an interstate shipment of goods and chattels may not necessarily be the commonly accepted limits of an individual's interstate journey. We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations.

Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when

he disembarks at the station in the city of destination. What happens prior or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the interstate movement. The traveler has complete freedom to arrive at or leave the station by taxicab, trolley, bus, subway, elevated train, private automobile, his own two legs, or various other means of conveyance. Taxicab service is thus but one of many that may be used. It is contracted for independently of the railroad journey and may be utilized whenever the traveler so desires. From the standpoints of time and continuity, the taxicab trip may be quite distinct and separate from the interstate journey. To the taxicab driver, it is just another local fare."

The Court's description of the taxicab service to and from the railroad stations in the *Yellow Cab* case applies with singular accuracy to the transportation service now furnished by Capital Transit Company within the District to persons who may make interstate journeys to and from Virginia, via the lines of the Virginia carriers, and who may use the transportation facilities of Capital Transit to go to and from the downtown areas in Washington where the lines of the Virginia carriers terminate. All of the material considerations which led this Court to hold that the taxicab service to and from railroad stations in the *Yellow Cab* case was too unrelated to interstate commerce to constitute a part thereof are equally applicable to the present transportation furnished by Capital Transit within the District.

The evidence of record is undisputed that, as in the *Yellow Cab* case, the transportation service of Capital Transit to and from the downtown areas is no different and is indistinguishable from and intermingled with other local transportation services furnished by the Company to all other persons within the District. Such service is not

limited to or exclusively for persons travelling to or from Virginia points via the lines of other carriers. The transportation service rendered by Capital Transit to such persons is only casual and incidental to its other local operations within the District. (Exhibit 137, p. 1897, transcript of hearing, I.C.C. Docket No. 28991, Nov. 21, 1947.)

Since April 1, 1947, Capital Transit has rendered no transportation service across the Virginia State line. Its certificate of authority from the Interstate Commerce Commission, authorizing transportation in interstate commerce between points in the District and points in Virginia, expired at that time and the Company was not willing to apply for further authority from the Commission. The Commission cannot grant a certificate, under Section 207 of the Act (49 U. S. C. 1946 Ed. § 307), over objection by the Company. Under the provisions of Section 206 of the Act (49 U. S. C. 1946 Ed. § 306) Capital Transit is prohibited from engaging in any interstate operation without a certificate of convenience and necessity issued by the Commission, unless such interstate operations are exempt from the application of the Act under Section 203(b)(7a) and (8) of the Act.

Capital Transit has no physical connections, coordination, arrangements for through transportation service or interchange of passengers, or common terminal facilities with either of the Virginia carriers involved in this case. (pp. 1474-1476, 1746, transcript of hearing, I. C. C. Docket No. 28991, Nov. 19 and 20, 1947). The passengers on the Virginia lines are free to come and go from terminals of such lines within the District by any means of transportation available. The lines of Capital Transit are not the only means of transportation available. The lines of Capital Transit are not the only means of mass transportation com-

ing and going to the terminals of the Virginia carriers, as asserted by appellants. There are one or more other carriers and there are numerous taxicabs, operating in such areas. (pp. 2076, 2110-2113, transcript of hearing, I. C. C. Docket No. 28991, Dec. 15, 1947). There is no relation in time or continuity between the transportation service on the lines of Capital Transit within the District and the transportation service on the lines of the Virginia carriers terminating in the District.

At no time have any of the carriers voluntarily engaged in the joint transportation of passengers. The participation in service under the joint fare tickets was initiated and is continued by Capital Transit only under the compulsion of the Orders of the Commission which are under attack in this case.

Appellants contend that the *Yellow Cab* case is inapposite because taxicab service is expressly excluded from the purview of the Interstate Commerce Act. We submit that such a statutory exclusion is irrelevant to application of the principles announced in the *Yellow Cab* case with respect to the character of the different kinds of transportation service. Indeed, the Commission itself attempted to adapt such principles from that case in its Opinion to serve its own ends.

United States v. *Capital Transit Co.*, 325 U. S. 357, is relied upon by the Government. But analysis of this Court's decision in that case on the second point decided demonstrates conclusively that under the present facts the Interstate Commerce Commission is without jurisdiction to make the requirements contained in the orders involved in this case. The first point decided in that case was not considered or decided below on the basis of the present record.

At the time of that decision and prior to April 1, 1947, Capital Transit operated two bus lines across the Virginia

State line into Arlington County under authority of a certificate from the Commission. As the Opinion of this Court shows, the interstate bus lines formerly operated by Capital Transit were integrated with and operated as a coordinated part of its streetcar and bus lines within the District of Columbia. These integrated interstate and local operations were referred to by the Court in the introductory paragraphs of its Opinion (325 U. S. at p. 359), and the Court found that the intra-company transfer practices of Capital Transit "were the equivalent of establishment by Transit of through interstate routes with joint rates." Again in speaking of the contention of the carriers on the second point decided in that case this Court referred to these "voluntarily established through routes" (325 U. S. at p. 362), and to the use by Capital Transit of "its streetcars and buses as an integrated unit in carrying out interstate transportation." (325 U. S. at p. 363). After discussing the "interstate journey" of Virginia workers the Court again referred to the fact that Capital Transit "itself conducted its own traffic to and from Virginia and District residential points as one continuous journey", and that "as carried out by Transit the arrangements were the exact equivalent of transportation on a 'through route' for a joint fare." (325 U. S. at p. 364).

On the second point decided this Court held that, under the then existing circumstances referred to above, the Commission had jurisdiction over Capital Transit service to prescribe fares for joint service between Capital Transit and the Virginia carriers. It so held on the stated basis that the Motor Carrier Act "need not be interpreted so as to permit the accomplishment of such a result" of establishing through routes "to the exclusion of its competitors." (325 U. S. at p. 364). Appellants now contend that all of such circumstances relied upon in this Court's Opinion are "irrelevant."

It follows from the opinion of the Court in *United States* v. *Capital Transit Co., supra*, that today, in the absence of the interstate bus lines of Capital Transit integrated with its transportation system in the District, there is no longer any basis for the former conclusions of the Court or for jurisdiction of the Interstate Commerce Commission over the transportation of Capital Transit. That transportation is now confined to service from one point to another within the District, so far as passengers making journeys to and from Virginia points are concerned. Such transportation is completely subject to the jurisdiction of the District Commission.

III

Appellant's Claim That Prior Litigation Is Res Judicata Has No Merit

Appellants contend as they did below and as the Commission did in its Report that the decision of this Court in *United States* v. *Capital Transit Co., supra*, makes the validity of all of the Commission's orders in this case *res judicata* so far as Capital Transit is concerned. The assignments of error, however, rely upon the doctrine of *res judicata* only with respect to the Commission's Order of June 22, 1945. That order was superseded by the Order of July 7, 1948, based on a new and different record. But in none of the prior Reports of the Commission nor in the prior decision of this Court was there any consideration or decision on the question of the effect of the limiting statutory language contained in the proviso to Section 216(e) of the Interstate Commerce Act under the present facts and circumstances. We have just shown that the Opinion of this Court in the prior case demonstrates conclusively that the cessation by Capital Transit of its service on its former interstate lines into Virginia was a material and vital change in the facts and circumstances which made inap-

plicable the former conclusion of this Court to the present facts.

A decision on a question of statutory jurisdiction or regulatory authority of an administrative body, like the Interstate Commerce Commission, necessarily rests upon the facts and circumstances of operations which bring such operations within the ambit of the statutory power conferred upon the Commission. The facts of operations which determine the question of statutory power are continually changing. Under these circumstances the doctrine of *res judicata* has no application where, as here, the prior decision was based upon a different record and is therefore not controlling in a new case based upon new administrative proceedings and presenting different facts and a different record. *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149, 150-151.

A decision on questions of confiscation or reasonableness of divisions or rates, such as were raised but not heard, argued or decided below, can never be *res judicata* in subsequent litigation. "Divisions valid when made may later become confiscatory"; and "a rate that is just and reasonable, when prescribed, * * * subsequently may become too low, unreasonable, and confiscatory." *Baltimore & O. R. Co.* v. *United States*, 298 U. S. 349, 371; *Banton* v. *Belt Line Ry Corp.*, 268 U. S. 413, 418. Appellants apparently concede this. In this case the Commission's Report and Order of July 7, 1948, on reopening, itself demonstrates that the fares prescribed by the earlier orders of the Commission, considered in the prior litigation, were and are now too low and unreasonable.

IV

Conclusion

It is respectfully submitted that the questions raised by Appellants, on which the decision of the cause depends, are

so unsubstantial as not to need further argument; and, accordingly, the Motion to Dismiss or Affirm should be granted.

Dated this 17th day of February, 1949.

Respectfully submitted,

(S.) EDMUND L. JONES,
(S.) F. G. AWALT,
(S.) SAMUEL O. CLARK, JR.,
(S.) DARYAL A. MYSE,
Attorneys for Appellee, Capital Transit Company.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 629

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

CAPITAL TRANSIT COMPANY,

Appellee

MOTION TO DISMISS OR AFFIRM AND REPLY TO APPELLANTS' STATEMENT AS TO JURISDICTION

Motion to Dismiss or Affirm

Comes now Appellee, Capital Transit Company, and moves that the decision and judgment of the statutory United States District Court composed of three judges, from which the appeal is taken in this case by the United States of America and the Interstate Commerce Commission, be affirmed; or, in the alternative, that such appeal be dismissed. Such Motion is made on the ground that the questions raised in said appeal on which the decision of the

cause depends are so unsubstantial as not to need further argument.

Dated this 17th day of February, 1949.

Respectfully submitted,

(S.) EDMUND L. JONES,
(S.) F. G. AWALT,
(S.) SAMUEL O. CLARK, JR.,
(S.) DARYAL A. MYSE,
Attorneys for Appellee, Capital Transit Company.